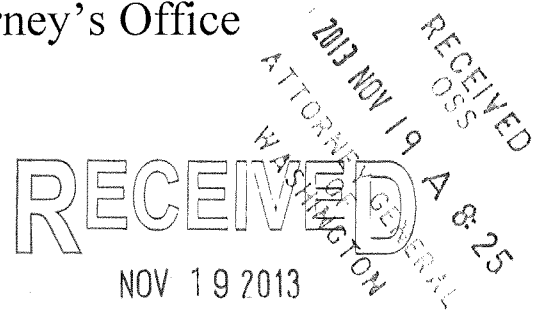


*Equal Justice for All*

# Lewis County Prosecuting Attorney's Office

November 15, 2013



ATTORNEY GENERAL'S OFFICE  
Solicitor General's Division

The Honorable Robert F. Ferguson  
Attorney General  
Washington State Office of the Attorney General  
1125 Washington Street SE  
P.O. Box 40100  
Olympia, WA 98504-0100

Re: Request for Attorney General Opinion

Dear Attorney General Ferguson:

Please accept this letter as request for a written opinion pursuant to RCW 43.10.030. I respectfully request an opinion on the following question:

1. Whether a County may enter into an interlocal cooperation agreement with a City that would, in limited circumstances, permit the County to terminate County water utility service to customers that have failed to timely pay their City sewer utility bills where the City has no other reasonable enforcement mechanism to enforce such payment.

As the Prosecuting Attorney for Lewis County ("the County"), one of the duties of my office is to serve as the legal advisor to the Board of County Commissioners on matters relating to the management of county affairs. As Prosecuting Attorney, I make this request for a written opinion of the Attorney General pursuant to RCW 43.10.030. The question posed seeks clarification regarding the interpretation of statutes relevant to management of county affairs, and is not the subject of pending or likely litigation. As described further below, this question is a matter of public importance in that its resolution will determine whether and how Lewis County and the City of Vader ("the City") can cooperatively manage separately operated water and sewer systems, and address ongoing delinquency of a significant number of the City's sewer utility accounts. While the County believes that it is in the public interest of its citizens to enter into such an agreement because it would enable the City to enforce payment of sewer accounts without having to foreclose sewerage liens or terminate sewer service, a last-resort option that could have significant public health impacts for both the City and the County, it seeks an Attorney General

Opinion to confirm the County's authority to enter into such agreements under state law.

My office has been advising the legislative authority of the County on the concept and negotiations for an interlocal cooperation agreement regarding water and sewer service, following the expected transfer of ownership of the water system from the City to the County in the first quarter of 2014.

The County respectfully requests an expedited review of this question. Expedited review would be beneficial as the question concerns a topic which the County understands to be one of the only remaining points of negotiation related to the transfer of ownership of the water system, it involves public health considerations for County residents concerning water supply, water quality, and considerations involved in terminating sewer service to residents.

### **Background Facts**

The City of Vader is a code city organized under chapter 35A RCW and located in southwest Lewis County. According to the 2010 census, the City has a population of 621. The City has experienced significant financial difficulties in recent years. The City's water system was placed in receivership in April 2011, and since that time Lewis County has managed and operated the water utility formerly operated by the City. The City's water system serves properties located both within the City's municipal boundaries as well as in adjacent unincorporated areas of Lewis County. The City and the County are working cooperatively, in consultation with the State of Washington Department of Health, to terminate the receivership and transfer ownership of the water system to the County under a proposed Agreement of Purchase and Sale of Water Assets. The County and the City would like to close on this transfer in the first quarter of 2014. As of that date, the County will become the owner of the water system. The City continues to own and operate its own sewer utility.

Prior to the water system being placed in receivership, as is common for utilities in Washington, the City jointly billed accounts for water and sewer service. Again as is common, whenever accounts for either water or sewer service were delinquent, the City would use its authority under RCW 35.67.290 to terminate water service (or send notice of intent to terminate water service) in order to encourage payment on delinquent accounts. This practice would typically result in the majority of accounts being paid. As matter of policy, the City has not made efforts to terminate sewer service because of the obvious and important public health and safety concerns associated with such a measure.

After April 2011 when the City's water system was placed in receivership, with the County acting as receiver, water and sewer billing were separated. The City continues to bill for sewer services, while the County bills for water service. Since April 2011, 248 City sewer accounts (identified by each two-month utility

billing cycle) have become delinquent. This number reflects 72 individual households, one-third (1/3) of all of the City's sewer connections. As the County is the court-appointed receiver of the City's water system, the City, acting alone, no longer has the ability to terminate water service (or send notice of intent to terminate water service) in order to encourage payment of sewer bills and, as such, the delinquent sewer bills continue to go unpaid. Upon termination of the receivership and transfer of ownership of the water system from the City to the County (expected to occur in the first quarter of 2014) the County will have sole authority over the water accounts.

These recurring delinquent accounts place a great strain on the City and jeopardize its ongoing efforts to update its sewer facilities and to meet State of Washington Department of Ecology standards. The financial impact of such delinquencies on a city of this size and character are significant. The City has no reasonable enforcement mechanism at this time and views commencement of foreclosure proceedings or termination of sewer service as an absolute last resort. As with all issues related to the handling of sewer and wastewater accounts, the County and City share the important public interest of preserving water quality in this area of the County, and interest that could be jeopardized if the City is unable to maintain a consistent revenue stream for upkeep of its wastewater facilities.

### **Legal Authority**

If legally permissible under state law, both the County and the City are amenable to an interlocal agreement whereby the County would agree to terminate water service for properties that are delinquent in their sewer account payment to the City. The County believes that Washington law permits such an agreement, but seeks confirmation of that authority.

Our research into this issue indicates that because both counties and cities have independent authority to terminate water service they control, an interlocal agreement permitting the County to terminate water utility service in order to assist the City in enforcing payment for delinquent sewer utility accounts is permitted under Washington law.

The Interlocal Cooperation Act grants public agencies the authority to contract with each other to perform any service they are each authorized to perform:

Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized by law to perform: PROVIDED, That such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes,

powers, rights, objectives, and responsibilities of the contracting parties.

RCW 39.34.080. Prior Attorney General Opinions have clarified that this language “does not require each party to an agreement to have pre-existing authority to exercise its powers in the specific context contemplated by the agreement,” but only “to have the general authority in question,” because such a narrow reading “would, for all practical purposes, render [the Interlocal Cooperation Act] a vain and useless act.” 2004 ATTORNEY GEN OP. NO. 2, at 5 (quoting 1978 ATTORNEY GEN. LETTER OP. NO. 18, at 6).

The fact that the City does not independently have the authority to terminate County-provided water services should be no barrier to the County’s voluntary use of its own authority to do so. Under state law, the City and the County are authorized to terminate water utility services for delinquent sewer accounts. Washington cities are granted this authority in RCW 35.67.290, which the legislature has extended to counties in RCW 36.89.065 and to code cities in RCW 35A.60.010. See generally RCW 35.67.290 (“As an additional and concurrent method of enforcing the lien authorized in this chapter any city or town operating its own municipal water system may provide by ordinance for the enforcement of the lien by cutting off the water service from the premises to which such sewer service was furnished after the charges become delinquent and unpaid, until the charges are paid”). The Interlocal Cooperation Act provides a mechanism whereby the County and the City may enter into an interlocal agreement to permit the exercise of this authority in a cooperative manner.

Moreover, beyond and separate from the basic authority provided by the Interlocal Cooperation Act and the above-cited statutes, counties and cities are explicitly permitted to voluntarily enter into cooperative interlocal management agreements related to sewer and water system management. See RCW 36.94.490 (“a county may, as part of maintaining a system of sewerage and/or water, participate in and expend revenue on cooperative watershed management actions, including . . . intergovernmental agreements, for purposes of water supply, water quality, and water resource and habitat protection and management”); see also RCW 35.21.210 (“any city or town may, as part of maintaining a system of sewers and drains or a system of water supply, or independently of such a system or systems, participate in and expend revenue on cooperative watershed management actions, including watershed management partnerships under RCW 39.34.210 and other intergovernmental agreements, for purposes of water supply, water quality, and water resource and habitat protection and management”).

The County, in maintaining its system of water, and the City, in maintaining its system of sewers, are each authorized under the above-cited statutes to enter into intergovernmental agreements for the purpose of water supply and for ensuring water quality and water resource protection. The

management of the City's sewer system and wastewater treatment facilities are critical to the protection of water quality and water resources in the Cowlitz River watershed and southwest Lewis County. This public policy purpose serves both County and City functions and goals. Payment of the City's sewer accounts and subsequent upkeep of sewer infrastructure, even if owned by the City, is related to the County's administration of the water utility and protection of water resources, serving an important public health purpose for both the County the City.

The above legal authority should be considered in light of the Washington Supreme Court's decisions upholding the broad power of local governmental entities in Washington to enter into contracts and to exercise their propriety powers as operators of utilities. See, e.g., *Hite v. Public Utility Dist. No. 2*, 112 Wn.2d 456, 458 (1989) ("the powers of a municipal corporation are not limited to those expressly granted by statute, but also include powers necessarily implied in such express powers"). In *Hite*, for example, the Court upheld a utility district's implied power to create a lien against real property through a private contract with a customer, even though this power was not explicitly granted by statute. The Court emphasized the broad power a municipal corporation has to "exercise its business powers in much the same way as a private individual or corporation." *Id.* at 459.

Here, the question presented is even more straightforward than in *Hite* – it does not involve a private contract with a customer and there is explicit statutory authorization for both Counties and Cities to enforce a lien for delinquent sewer service charges through termination of water service. From the customers' perspective, there is no new enforcement mechanism or "surprise" lien that would be created or enforced by the agreement that the County and City are considering. The proposed agreement simply enables enforcement of the existing law, exactly as was done by the City, acting alone, prior to 2011, by the County as opposed to the City, and pursuant to an interlocal agreement between the jurisdictions. The County's operation of the water utility, includes those power necessarily implied in that authority, which should include the power to regulate the provision of water service to properties that are current in their sewer utility accounts.

Finally, as a practical matter, if in fact the City were to move forward with foreclosing sewer liens or terminating sewer accounts for non-payment, the County would be put in the precarious position of providing water utility service to a property that had no authorized sewer connection. This presents obvious concerns of the County facilitating and permitting the use of household and commercial toilets, showers, kitchens, laundry facilities and the creation of untreated greywater and blackwater (sewage) no longer authorized to be released to the City's sewer utility, creating an untenable public health and safety risk, for not only the occupants of the premises, but to County residents and the environment and water resources at large. Absent the County entering into an

interlocal agreement with the City for the County to exercise its termination authority, the City will be left with no other practical recourse (short of lien foreclosures), creating a significant hardship for the City and likely public health implications for both the County and the City. We believe the legislature did not intend this, and as such, the County and City must have authority to act jointly through interlocal agreement to ensure the enforcement mechanisms intended (discontinuance of water service) can be relied on in this instance through the cooperation of the County and the City.

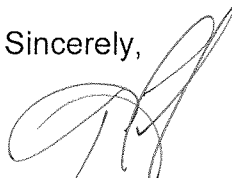
### Conclusion

Municipal corporations have "discretion in exercising their proprietary powers so long as their actions are not arbitrary, capricious, or unreasonable." *Hite*, 112 Wn.2d at 463. Accordingly, all relevant authority demonstrates that the County and the City may enter into the voluntary agreement they propose. They both have the statutory authority to shut off water service for their own water systems, as cited above, and further have the authority to enter into a cooperative interlocal management agreement for this purpose. The alternative – that the City begin foreclosure proceedings or shut off sewer service to the 72 delinquent households – is an outcome that both the City and County strongly hope to avoid. The County and the City agree that it is in the best interest of all the residents of Lewis County if they enter into the proposed agreement. Accordingly, as Prosecuting Attorney for Lewis County, I respectfully request an opinion of your office as to the County's legal ability to enter into an interlocal agreement that would permit the termination of water service to properties with delinquent sewer accounts.

Thank you very much for your consideration of this important question.

In the meantime, if you have any questions, do not hesitate to contact me directly at (360) 740-2638.

Sincerely,



JONATHAN L. MEYER  
Prosecuting Attorney

JLM:clc